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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1342

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

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IN THE

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OCTOBER TERM, 1971

NO._____

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

To The Honorable Supreme Court Of The United States:

Frederick P. Adams respectfully petitions the Court to grant a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter reverse the cause and remand it for trial on the merits.

Opinions Below

1) The Opinion of the District Court is reported in 316 F. Supp. 938.

2) The Opinion of the Circuit Court is reported in 452 F.2d 994 (12/10/71) (see Appendix "A").

Statement of Jurisdiction

Petitioner seeks to review the Opinion and Judgment of the Court of Appeals, under date of December 10, 1971. Petitioner's Motion for Rehearing was overruled on January 18, 1972 (see Appendix "B"). Statutory jurisdiction is conferred under Title 28 U.S.C.A. §1254.

Questions Presented

1) Whether a United States District Court has admiralty jurisdiction, either under Title 46 U.S.C.A. §740, or under the general maritime law, of a tort occurring on a drawbridge when the draw was being raised *solely to accommodate maritime commerce.*

2) Whether the Court of Appeals utilized an improper procedural test in resolving testimonial differences in favor of Harris County when its jurisdiction existed solely by reason of Title 28 U.S.C.A. §1292(b), the statute authorizing interlocutory review ~~under limited~~ circumstances.

3) Whether the Court of Appeals should have remanded the cause for trial on the merits pursuant to the holding in *Chevron Oil Co. v. Huson,* 92 S.Ct. 349, 356 (12/6/71), since the controversy arose before *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

Constitutional and Statutory Provisions Involved

1) Under the first question presented:

(a) Constitution, Art. III, §2, Cl. 1, providing that the judicial power of the United States "shall extend to *all* cases of admiralty and maritime jurisdiction."

(b) Title 28 U.S.C.A. §1333, reading in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) * * *."

(c) Admiralty Extension Act of 1948, Title 46 U.S.C.A. §740:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, *caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land." (Emphasis added)

2) Under the second question:

Title 28 U.S.C.A. §1292(b):

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question as to which there is substantial ground for difference of opinion[1] and that an immediate appeal

1. Incipiently, the District Judge refused to make this determination, believing no "substantial ground for difference of opinion

from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. * * *"

Statement of the Case

On Easter Sunday, March 26, 1967, Petitioner was riding his motorcycle on a roadway which crossed Cedar Bayou, a navigable stream, by means of a drawbridge. As Adams approached the draw section of the bridge, a pleasure boat was likewise approaching in the stream. Suddenly, and without warning, the drawbridge keeper opened the draw and dropped the barricade on Adams, *causing him to become a quadriplegic.*

The Court of Appeals took a view of the evidence that patently favored Respondent. In doing so, it not only quoted portions of the District Court's opinion written before any testimony was taken, but put the case in such a way as to make it appear that there was no connection with maritime commerce. To the contrary, the accident resulted *solely* or *principally* from the operation of the draw to *aid* maritime commerce, and the occurrence was also "caused by a vessel" in the sense those terms are used in the Admiralty Extension Act.

---

existed" (see Appendix "C"), but a spurious and scurrilous effort to mandamus the District Judge, although abortive, resulted in a "suggestion" by the panel (Wisdom, Coleman and Simpson) that the refusal to grant the relief was without prejudice to the County's right to reassert its motion to certify. Thus, in light of the awesome injuries sustained by Adams, his counsel could not in good conscience subject him to the rigors of a trial on the merits, perhaps only to have a successful judgment taken away from him by a panel who appeared to have already "decided" the controversy against him under a wretched attack upon the District Judge and counsel for Petitioner. (See page C4 of Appendix "C")

Reasons for Granting the Writ

1) Is an injury to a person on a drawbridge resulting from the operation of the draw section intended to accommodate maritime commerce a tort under the general maritime law?

The Court of Appeals reasoned that this Court's decision in *Rodrigue v. Aetna Casualty Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), buttressed by its own subsequent decision by the same panel in *Cookmeyer v. Louisiana Department of Highways*, 309 F. Supp. 881 (E.D. La., 1969), aff'd 433 F.2d 386 (5 Cir. 1970), cert. den. 401 U.S. 980 (1970), preempted jurisdiction under the general admiralty law. Respondent also now relies on *Victory Carriers, Inc. v. Bill Law*, 92 S.Ct. 418 (12/13/71), decided subsequent to the opinion in the present case.

Petitioner has continually asserted and insisted that not only are these authorities distinguishable, but that *Rodrigue* is direct authority in his favor. Conceding, *arguendo*, that this Court has essentially reaffirmed the "strict locality" test for determining the presence or absence of admiralty jurisdiction in *Rodrigue* and *Victory Carriers*, nothing was said to enervate the "historical exceptions" extending maritime jurisdiction to causes arising out of the use or employment of navigational aids. *The Raithmoor*, 241 U.S. 166, 36 S.Ct. 514, 60 L.Ed. 937 (1915); *The Blackheath*, 195 U.S. 361, 25 S.Ct. 46, 49 L.Ed. 236 (1904); *Peytavin v. Govt. Employees Ins. Ass'n*, 453 F.2d 1121, 1123 (5 Cir. 1972); *1 Benedict, The Law of Admiralty* (6th Ed.) §129, N.2 (1904). In *Rodrigue* the Court clearly recognized this exception in the following language:

"Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the Sea. To the extent that it has been applied to fixed structures completely sourrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure *solely or principally used as a navigational aid*. But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.

"The accidents in question here involved no collision with a vessel, and the *structure was not a navigational aid*. It was an island, albeit an artificial one, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." (Emphasis added.)

In that the totality of a drawbridge is an obstruction to water commerce, the draw portion, when being operated, is patently an "aid to navigation" within the ambit of this exception. *Clement v. Metropolitan West Side Electric Railway Company*, 123 Fed. 271 (7 Cir. 1903); *United States v. Eastern Transportation Co.*, 50 F. Supp. 815 (Md. 1943). Unquestionably, the sole purpose for operating the draw on the occasion was to permit the passage of a vessel in a navigable stream, albeit a pleasure craft. Nor does the fact that the dropping of the barricade was the immediate cause of the occurrence militate against this conclusion. The purpose of the barricade was as much to prevent an approaching motorist from plunging through the draw and damaging the vessel or its passengers as it was to prevent injury to the motorist. Not even Respondent suggests that maritime jurisdiction would not have

attached had Adams run off the bridge, whether struck by the barricade or not.

Certainly *Victory Carriers* does not emasculate the "historical exception"! The issue there put was:

> "* * * Nor, in the absence of congressional guidance, are we now inclined to depart from prior law and extend the reach of federal law to pier-side accidents *caused by a stevedore's pier-based equipment.*" (Emphasis added.)

Bottomed upon *Nacirema Operating Co. v. Johnson*, 396 U. S. 212, 223, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969), the Court held such an injury, caused by "pier-based equipment," was beyond the pale. (92 S.Ct. at pp. 424-25)

Not only do *Rodrigue*, *Victory Carriers* and *Nacirema Operating Company* turn on statutory attempts to limit or delimit maritime jurisdiction, as the case may be, but in neither instance did this Court suggest that the "navigational aid" exception was to be struck down. Further, had the injury in *Victory Carriers* been precipitated by *"ship-based equipment"* jurisdiction would have existed perforce *Guitierrez v. Watermans Steamship Co.*, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297 (1963). Here, as in the hypothetical example, the injury was precipitated solely by a "navigational aid."

Under the circumstances of this case, it is perhaps not unusual that this panel felt obligated to follow its earlier opinion in the *Cookmeyer* case. What is extraordinary, however, is that panel's unwillingness to mention the distinction between the two fact situations, particularly since it had to have been noted and anticipated by counsel for

Respondent.[2] In that case the injury was not related to the operation or movement of the draw at all, but rather to the motorcyclist striking portions of the bridge when it was in a stationary position.

It would be useless to belabor the questions. The matter is simply one of whether this Court meant what it said in *Rodrigue;* specifically, whether the "structure" causing the injury was used *"solely or principally as a navigational aid."* It clearly was, and this grievously injured young man should not be cast upon the "judicial junk heap" that exists in the state practice.[3]

2) The Court of Appeals erred in considering interlocutory appeal in a context favorable to Respondent.

The Court of Appeals reviewed the record thusly:

On Easter Sunday, March 26, 1967, Mr. Adams, the plaintiff-appellee, was riding his motorcycle on a public highway which crossed Cedar Bayou, a navigable stream, by means of a bridge permanently connected to the roadway and suspended over the water by per-

2. In Respondent's "Supplemental Brief" before the Court of Appeals, at page 11, counsel noted:

"* * * It is anticipated that the plaintiff will insist that the *Cookmeyer* case is not applicable to the situation at hand because *in that case the injuries sustained by the claimant were not directly related to the movement of the bridge as it opened to allow vessels to pass through.* * * *" (Emphasis added.)

3. At the time of this accident, Texas adhered to the ancient and antiquated doctrine of "governmental immunity," which of course has never obtained in admiralty. Since the accident, in large part due to this tragedy, the Texas Legislature enacted a Texas Tort Claims Act which would have provided state-side coverage (but for the overlay of admiralty jurisdiction) for a similar accident. Unfortunately, however, the new Act is prospective only.

manent pilings driven into the channel below. The bridge was equipped with a draw section, which was mechanically raised and lowered to permit the passage of vessels plying the stream. As Adams, on or near the bridge, approached the draw, a relatively small pleasure boat was likewise approaching. To quote the District Court, 316 F.Supp., at 940, "Without any indication from the vessel that it was necessary to do so, the bridge keeper caused the bridge to begin to open. At that instant, when plaintiff began to cross the bridge, the barricade lowered into place and was struck by the motorcycle. Plaintiff was thrown several feet into the air and fell either on the bridge or close by. His theory of recovery is negligent maintenance."

Perhaps the District Court's observations are excusable in that no testimony had been taken at the time the Opinion was written, but the same cannot be said of the Court of Appeals Opinion. Before that Opinion was delivered, Petitioner observed at page 2 of his "Supplemental Brief":

"Statement of the Case

"The Appellant, Harris County, Texas, has incorrectly stated the case. At one point during its Argument (see Page 4 of its Supplementary Brief) it concedes that all facts alleged in the Plaintiff's Original Complaint must be taken as true by the Court. In the very next paragraph, however, it asserts that Adams ran into the "safety barricade arm on the drawbridge" (see Pages 2 and 4). It even purports to summarize deposition testimony to that effect. The precise allegations of the bill of complaint were:

> * * * As a direct and proximate result of the negligence of the employees of Harris County, Texas, and of Harris County, Texas, no adequate warning devices and no adequate warning of the danger confronting Frederick P. Adams by reason of the operation of the drawbridge was given, and by reason of the negligent operation of the drawbridge in question, Frederick P. Adams *was caused to be struck and knocked about by the operation of the drawbridge,* sustaining the injuries herein complained of. (Emphasis added, R. 30)

The only independent eye-witness to the occurrence, Sandra Ann Fortney, who was on board her husband's boat which was approaching the bridge on the occasion, testified in pertinent part:

> "I don't know what caused the bridge to be lifted, but all of a sudden the bridge was being lifted, and I spotted the boy on the motorcycle coming at this slow rate of speed, and all of a sudden the bridge started coming up, and I became alarmed and probably yelled. *All of a sudden the arm dropped and hit him.* * * * (SAF Dep., Page 12)"

In interlocutory appeals, as in summary judgment proceedings, the pleadings of the respondent must be accepted as true and all evidentiary disputes are to be resolved in favor of the party against whom the relief is sought. *United States v. Diebold, Inc.,* 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Vandenberg v. Newsweek, Inc.,* 441 F.2d 378, 379 (5 Cir. 1971); *City of Burbank v. General Electric Co.,* 329 F.2d 825, 829 (9 Cir. 1964); *Dearborn Stove Co. v. Farmers Co-Op,* 304 F.2d 273 (8 Cir. 1962).

As applied to this case, the contravention of those principles resulted in a totally erroneous approach to the dispute. The resolution of the question of whether it was "necessary" or not to raise the draw, and whether Adams ran into the barricade or it "dropped and hit him," have no substance in this type of appeal, although we of course would contend that jurisdiction still exists in either instance.

More specifically, the reference by the Court of Appeals to the contention of Respondent that jurisdiction is preempted because it was not "necessary" to raise the draw undoubtedly led to a misinterpretation of the "caused by a vessel" proviso of the Admiralty Extension Act of 1948. Based upon this erroneous acceptance of testimony *favorable to Respondent*, the Court of Appeals concluded:

> "* * * The District Court stated in its Opinion, 316 F.Supp. at 940, that the bridge keeper cause (sic) the bridge to begin to open, which, in turn, caused the barricade to drop, *without any indication from the vessel that it was necessary to do so.* The inescapable conclusion is that the dropping of the barricade was *solely the act of the bridge keeper* and no act of the vessel was *proximately caused by his negligence*, if there was any." (Page 5 of Appendix "A", emphasis added)

Several observations are indicated.

First, it is apparent that the above summation, as well as the previously quoted resumé of the facts by the Court of Appeal, are in disregard of the pleadings and the only evidence regarding what actually transpired.

Second, the mere fact that some of these observations appear in the original Opinion of the District Court does

not sanctify them as "findings of fact," as that Court was powerless to *find facts* in this present context. Moreover, the statements in the Opinion predated the actual testimony of the only witness to the occurrence who stated Adams "was proceeding at this slow rate of speed" and "all of a sudden the *arm dropped and hit him.*" (Sandra Ann Fortney Dep., p. 12)

Third, even if the bridge keeper did mistakenly assume there was a necessity to raise the draw to permit the passage of the vessel, that "mistake" would not change his actions and conduct to shoreside tort. Even in that event his purpose was to use a "navigational aid" to assist "maritime commerce"; it was not to help Adams, whom he never even saw!

Fourth, and most significantly, the Court of Appeals announced a totally erroneous test for ascertaining jurisdiction under the Admiralty Extension Act when it substituted a "proximate cause" requirement for the "caused by a vessel" language of this salutary legislation. As this Court said in *Victory Carriers*:

> "The relative roles of state and federal law nevertheless remained somewhat confused on the seaward side of the pier. But shoreward, absent legislation, the line held fast. The Court refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks or other shore-based property. The Plymouth, 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1865). Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co., 208 U.S. 316, 28 S.Ct. 414, 52 L.Ed. 508 (1908); The Troy, 208 U.S. 321, 28 S.Ct. 416, 52 L.Ed. 512 (1908); Martin v. West, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed. 159 (1911).

> *"Congress was dissatisfied with these decisions and passed the Admiralty Extension Act of 1948 specifically to overrule or circumvent this line of cases."* (92 S.Ct. at p. 423, emphasis added)

While this quoted language does not relate to the "navigational aid" exception discussed in *Rodrigue,* it clearly sets forth the reason for the Extension Act. Nor has the Act been interpreted to require more than a cause-in-fact relation to the injury or loss. *Gebhard v. Hawaiian Legislator,* 425 F.2d 1303 (9 Cir. 1970); *Fematt v. City of Los Angeles,* 196 F.Supp. 89 (S.D. Cal. 1961); *Havland v. Fearnley & Egger,* 110 F.Supp. 659 (E.D. Pa. 1952). If the Act is to be limited to *proximal conduct,* little purpose was subserved by its enactment.

The Court of Appeals not only myopically considered the record from Petitioner's viewpoint, but it ascribed an unduly restrictive interpretation to the Admiralty Extension Act. If a "vessel" *causes* an occurrence in the sense that it would not have occurred *but for* its presence and movement in navigable waterways, and the instrumentality of harm is solely or principally utilized to aid maritime commerce, it is not or should not be necessary that the harm be a *foreseeable* or *anticipated* consequence of the wrongful act of the defending party for purposes of the attachment of admiralty jurisdiction. These ancillary considerations are only relevant to the merits of the cause!

3) At the least, the cause should be reversed and remanded because it was accepted that an injured claimant did have an admiralty claim prior to Rodrigue in these circumstances.

Prior to *Rodrigue* there was no serious question but that maritime jurisdiction existed in cases such as this.

Counsel for Respondent and the Court of Appeals so recognized. For example, we submit the following observations require a remand under the rule announced in *Chevron Oil Co. v. Huson*, 92 S.Ct. 349, 350 (12/6/71):

(1) The accident in question occurred prior to the decision in *Rodrigue;*

(2) If the present opinion stands, Adams will be without remedy in any form under the law as it has been interpreted;

(3) In Harris County's original Brief, before the Court of Appeals, it was clearly recognized that pre-*Rodrigue* a different conclusion would obtain;

(4) In the letter to the Court of Appeals of December 26, 1971, counsel for the County again recognized the prior status of the law on the question, "Appellee would cause a gathering of eagles to reconsider a question of law that *might have been important two years ago. . .*"; and

(5) At the time the cause was orally argued the presiding judge stated that, but for *Rodrigue*, he would agree with the District Court and counsel for Adams.

In *Huson* the Court said:

> "To hold that the respondent's lawsuit is retroactively time-barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. Rodrigue v. Aetna Casualty & Surety Co., supra, 395 U.S. at 361, 365, 89 S.Ct. at 1840, 1842. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on

the basis of superseding legal doctrine that was quite unforseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.

> *"It would also produce the most 'substantial inequitable result,'* Cipriano v. City of Houma, supra, 395 U.S. at 706, 89 S.Ct. at 1900, to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation which the law imposed upon him. In Cipriano v. City of Houma, supra, we invoked the doctrine of nonretroactive application to protect property interests of 'bondholders and others connected with municipal utilities'; and, in Allen v. State Board of Elections, supra, we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury . . . an injury that may significantly undercut his future earning power . . . is entitled to similar protection. As in England v. State Board of Medical Examiners, supra, nonretroactive application here simply preserves his right to a day in court.
>
> "Both a devotion to the underlying purpose of the Land's Act absorption of state law and a weighing of the equities requires non retroactive application of the state statute of limitations here. Accordingly, although holding that the opinion of the Court of Appeals reflects a misapprehension of Rodrigue, we affirm its judgment remanding this case to the trial court. It is so ordered." (Emphasis added)

It would indeed produce a most substantial and inequitable result for the Court to refuse to review this cause. Adams would be without remedy in admiralty, or according to the County, in any forum.

CONCLUSION

No doubt this is the time to face the case for what it is! Petitioner has been grotesquely injured perforce the clear neglect of an employee of a unit of government. The shield of governmental immunity has once again been raised, and while it has now disintegrated in the state system, not so for Fred Adams.

Speaking more legalistically, the case falls within the "historic exception" to the "strict locality of injury test" relating to "navigational aids"; and nothing announced in *Rodrigue* mutates that exception. Furthermore, the injury was "caused by a vessel" within the purview of the Admiralty Extension Act of 1948, and thus the cause should be reversed for a trial on the merits.

Respectfully submitted,

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CERTIFICATE

Three copies of the above and foregoing Petition for Writ of Certiorari have been deposited in the United States mail with first class postage addressed to counsel for Respondent.

W. JAMES KRONZER, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO._____

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

APPENDICES

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2267

FREDERICK P. ADAMS,
Respondent-Appellee,

versus

HARRIS COUNTY, TEXAS,
Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(December 10, 1971)

Before WISDOM, COLEMAN, and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: This was a suit for permanent personal injuries suffered by a motorcyclist on a drawbridge across a navigable stream. The District Court denied a motion to dismiss for lack of admiralty jurisdiction. The opinion below is reported, 316 F.Supp. 938 (S.D., Tex., 1970). Upon interlocutory appeal to this

Court, 28 U.S.C., § 1292(b), the judgment of the District Court is reversed. The cause is remanded with directions to dismiss the complaint for lack of admiralty jurisdiction.

On Easter Sunday, March 26, 1967, Mr. Adams, the plaintiff-appellee, was riding his motorcycle on a public highway which crossed Cedar Bayou, a navigable stream, by means of a bridge permanently connected to the roadway and suspended over the water by permanent pilings driven into the channel below. The bridge was equipped with a draw section, which was mechanically raised and lowered to permit the passage of vessels plying the stream. As Adams, on or near the bridge, approached the draw, a relatively small pleasure boat was likewise approaching. To quote the District Court, 316 F.Supp., at 940, "Without any indication from the vessel that it was necessary to do so, the bridge keeper caused the bridge to begin to open. At that instant, when plaintiff began to cross the bridge, the barricade lowered into place and was struck by the motorcycle. Plaintiff was thrown several feet into the air and fell either on the bridge or close by. His theory of recovery is negligent maintenance".

As to the locality of the injuries, this case is exactly similar to that which we decided in *Cookmeyer v. Louisiana Department of Highways*, 309 F.Supp. 881 (E.D., La., 1969); Affirmed, 5 Cir., 1970, 433 F.2d 386; cert. denied 401 U.S. 980. The only factual difference between *Cookmeyer, supra,* and the instant appeal, as to the locality of the alleged tort, is that in *Cookmeyer* the channel was opened for the passage of vessels by swinging barges on a pivot, whereas here the bridge was opened for the passage of vessels by raising and lowering the draw section.

In *Cookmeyer*, the District Court held, 309 F.Supp., at 884:

> "The accident forming the basis of this suit having taken place on a bridge, this Court lacks admiralty jurisdiction under the premise that a bridge or other structure firmly attached to the land is an extension of land and hence not a subject of the maritime jurisdiction of this Court."

We affirmed and the Supreme Court denied certiorari.

Therefore, so far as it reaches, *Cookmeyer* is controlling and there was no admiralty jurisdiction.

Plaintiff-appellant contends, however, that because the light pleasure craft was approaching the bridge and the draw was in the act of being raised to permit it to pass through the bridge, jurisdiction attaches by reason of the Admiralty Extension Act of 1948, 46 U.S.C., §740:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

In *Rodrigue v. Aetna Casualty Company*, 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360, the Supreme Court spoke as follows:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea. To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved

collision with a ship and has been explained by the use of the structure solely or principally as a navigational aid. But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.

"The accidents in question here involved no collision with a vessel, and the structures were not navigational aids."

Again, in *Nacirema Operating Company, Inc. v. Johnson*, 1969, 396 U.S. 212, 222, 90 S.Ct. 347, 24 L.Ed.2d 371, the Supreme Court elaborated upon the Extension Act:

"The Act no doubt extended the admiralty tort jurisdiction to ship-caused injuries on a pier. But far from modifying the clear understanding in the law that a pier was an extension of land and that a pier injury was not on navigable waters but on land, the Act accepts that rule and nevertheless declares such injuries to be maritime torts if caused by a vessel on navigable waters.

"The Extension Act was passed to remedy the completely different problem that arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all."

In this case we have navigable water and we have a vessel, albeit a light pleasure boat. The question, then, is: Did the vessel cause the injuries to the motorcyclist on the bridge? The vessel was simply approaching the bridge, as any vessel in those waters had a right to do. There is no showing that it was negligent in any respect. It is not charged with a tort of any

kind. It had no control, could exercise none, and attempted to exercise none over the manner in which the bridge keeper performed his duties. As mentioned in *Rodrigue* and in *Nacirema, supra,* there was no physical contact between the pleasure boat and the bridge. There was no damage to the bridge. There was no physical contact between the boat and the motorcycle. The District Court stated in its opinion, 316 F.Supp. at 940, that the bridge keeper caused the bridge to begin to open, which, in turn, caused the barricade to drop, without any indication from the vessel that it was necessary to do so. The inescapable conclusion is that the dropping of the barricade was solely the act of the bridge keeper and no act of the vessel proximately caused his negligence, if there was any.

It inexorably follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act.

At 316 F.Supp. 943, the District Court wrote as follows:

> "There is also an alternate theory upon which admiralty jurisdiction can be based. That theory is, notwithstanding the locality of the events which gave rise to this suit, the tort is one essentially maritime in nature. Consequently, torts occurring as a consequence of the operation of drawbridges are related to that purpose and are cognizable in a court of admiralty.
>
> "It has not been overlooked that the function of a bridge, as such, over navigable water is to allow vehicular and pedestrian traffic to pass from one side of the waterway to the other. The sole and exclusive function of a drawbridge, however, is to allow mari-

time traffic to pass along navigable water. Because a vessel was passing underneath the drawbridge in this case, and because plaintiff was injured by the movement of that bridge to allow passage, the relationship of those injuries is so substantially related to maritime commerce as to be embraced by admiralty jurisdiction."

This view is supported by no citation to precedent. It fails to take into consideration that the injuries in question occurred on a permanently fixed extension of land and in the absence of any maritime causation other than the approach of a vessel, without more.

The judgment of the District Court denying the motion to dismiss for lack of jurisdiction, is reversed. The case is remanded, with directions to dismiss the complaint.

REVERSED and REMANDED, with directions.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2267

FREDERICK P. ADAMS,
Respondent-Appellee,

versus

HARRIS COUNTY, TEXAS,
Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Dec. 10, 1971, 5 Cir, 1971, ___ F.2d ___).

(January 18, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "C"

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 69-H-215

FREDERIC P. ADAMS

V.

HARRIS COUNTY, TEXAS

(Filed March 20, 1971)

ORDER GRANTING DEFENDANT'S MOTION FOR INTERLOCUTORY APPEAL IN ACCORDANCE WITH THE PROVISIONS OF 28 U.S.C. §1292(b)

This suit was filed on March 6, 1969, in which the plaintiff alleges he sustained permanent injuries as a result of an accident that occurred on March 26, 1967, on which occasion he sustained his injuries as a result of the operation of a drawbridge across Cedar Bayou in Harris County, Texas, Cedar Bayou being a navigable body of water on and over which vessels carrying cargo in interstate and international commerce navigate. The injuries received by plaintiff resulted in his becoming paralyzed from his neck down and causing him to be a quadriplegic. This brief resume of facts is undisputed.

The defendant, Harris County, initially filed a motion to dismiss on the basis that this court lacked admiralty jurisdiction.

On September 5, 1969, a pretrial conference was held at which time the plaintiff filed its brief in opposition to defendant's motion to dismiss and defendant was given to November 3, 1969, to file a reply brief. On October 30, 1969, the court granted defendant an extension of time to file its brief. On November 14, 1969, the defendant's brief was filed. On July 30, 1970, this court entered its order overruling defendant's motion to dismiss, giving its reasons therefor in a memorandum opinion reported at 316 F. Supp. 938.

Defendant's grounds for its motion to dismiss were three in number:

(1) that the tort was not a maritime tort;

(2) that the sovereign immunity of the State of Texas precludes the suit; and

(3) that the eleventh amendment to the Constitution of the United States is applicable, thereby preventing a suit of a resident of the State of Texas against the State of Texas.

On August 10, 1970, the defendant filed its motion requesting this court to amend its order overruling defendant's motion to dismiss and requesting the court to permit an interlocutory appeal in accordance with 28 U.S.C. § 1292(b).

On October 15, 1970, a pretrial conference was set for February 4, 1971, and on that date a pretrial conference was held at which this court discussed defendant's

motion to certify an interlocutory appeal and same was denied and the attorneys were ordered to complete all discovery in the case and have this court's pretrial order filed on or before June 1, 1971, and the case was set for a trial docket call on June 1, 1971, at 9:30 a.m.

On March 17, 1971, the defendant filed a petition for writ of mandamus with the United States Court of Appeals for the Fifth Circuit in which defendant requested that court to mandamus this court requiring this court to certify an interlocutory appeal.

On April 8, 1971, the Court of Appeals denied defendant's petition for writ of mandamus without prejudice to the rights of the parties to pursue steps leading to appeal under 28 U.S.C. § 1292(b), including motion for rehearing which motion has now been filed by defendant.

This court set a pretrial conference for May 14, 1971, to discuss defendant's new motion. As a result of that conference and for the reasons hereinafter stated, this court grants defendant's new motion for an interlocutory appeal under 28 U.S.C. § 1292(b).

Title 28 U.S.C. §1292(b) provides in pertinent part that the Courts of Appeal shall have jurisdiction of an appeal "[w]hen a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

Although this case is set for trial on June 1, 1971, and could go to trial on that date and involves a rather uncomplicated factual situation, *the attorneys for the plaintiff have now stated to the court that the physical and mental condition of the plaintiff is such that they are unwilling to subject him to a trial if there is any substantial question of federal jurisdiction which could possibly cause the trial to be a useless endeavor,* (emphasis supplied by counsel for Petitioner) and this has caused them to have no objection to the certification of an interlocutory appeal. This position and lack of opposition has persuaded this court that the administration of justice would be best served if the court certifies for an interlocutory appeal its order overruling defendant's motion to dismiss for want of jurisdiction.

The controlling questions of law in this case are whether or not plaintiff's injury resulted from a maritime tort and thereby federal jurisdiction attaches under traditional admiralty principles and the question of whether or not the Admiralty Extension Act applies. Each of these questions was discussed in this courts Memorandum Opinion, 316 F. Supp. at 941-943. This court recognizes that there could be substantial grounds for differences of opinion in connection with these questions, although this court is confident of the correctness of its disposition of these questions. In connection with this court's conclusion that federal jurisdiction attaches under traditional admiralty principles, this court stated in its Memorandum Opinion as follows:

> "There is also an alternate theory upon which admiralty jurisdiction can be based. That theory is, notwithstanding the locality of the events which gave

> rise to this suit, the tort is one essentially maritime in nature. * * * The sole and exclusive function of a drawbridge, however, is to allow maritime traffic to pass along navigable water. Because a vessel was passing underneath the drawbridge in this case, and because plaintiff was injured by the movement of that bridge to allow passage, the relationship of those injuries is so substantially related to maritime commerce as to be embraced by admiralty jurisdiction."

To amplify this conclusion, this court wishes to emphasize its considered judgment that the "draw" portion of a drawbridge has one and only one function and that is as an aid to navigation. It can have no other function. The bridge itself may have a function of connecting two bodies of land separated by navigable waters or streams and thereby permit vehicular traffic to cross over such navigable waters or streams; but the "draw" portion of the bridge, when it is used for the purpose of opening the bridge so as to permit vessels to pass underneath, can have no function of aiding vehicular traffic but can have only the one function of aiding navigation. The Supreme Court in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 23 L.Ed.2d 360 (1969), apparently recognized that admiralty jurisdiction would attach if the instrumentality causing the injury was a navigational aid. In that opinion, Mr. Justice White speaking for a unanimous court, pointed out that the plaintiffs there met their deaths on artificial island drilling rigs located off the Louisiana coast and that *these islands were not erected primarily as navigational aids* and the accident bore no relation to any "such function" and "the accidents in question . . . involved no collision with a vessel, *and the structures were not navigational aids.*" *Rodrigue*, 395 U.S. at 360. Apparently

the result of *Rodrigue* would have been otherwise had the instrumentality causing the injury been a navigational aid as was the instrumentality here.

For the reasons stated herein and no others, this court grants defendant's motion to certify for an interlocutory appeal and the same is so ordered. This order is to be effective as of June 1, 1971.

/s/ JOHN V. SINGLETON
United States District Judge